

BEFORE THE
GOVERNING BOARD
PASADENA UNIFIED SCHOOL DISTRICT

In the Matter of the Layoffs of:

Certain Certificated Employees of the
Pasadena Unified School District,

Respondents.

OAH No. 2012030951

AMENDED PROPOSED DECISION

Administrative Law Judge Amy C. Yerkey, State of California, Office of Administrative Hearings, heard this matter on April 23, 2012, in Pasadena, California.

Jeff C. Marderosian, Attorney at Law, represented the Pasadena Unified School District (District).

Respondents are the 55 individuals identified in exhibit 4B, which is incorporated by reference as if fully set forth herein. Glenn Rothner and Maria Keegan Myers, of Rothner, Segall & Greenstone, represented the 53 Respondents identified in exhibit A. During the hearing, a conflict of interest that developed which caused Mr. Rothner and Ms. Myers to cease representation of Respondent Angela Chavez (Chavez). Thereafter, Respondent Chavez represented herself. Respondent Jeffrey Habell (Habell) also represented himself.

At the hearing, the District withdrew the Accusation against Respondent Sandra Banuelos.

The record was held open for submission of closing briefs. Respondents' closing brief was marked for identification as Exhibit D. The District's brief and attachments were collectively marked as Exhibit 17. The matter was submitted on April 25, 2012.

FACTUAL FINDINGS

1. Jon Gundry made and filed the Accusations in his official capacity as the District's Superintendent.

2. Respondents were at all times mentioned certificated District employees.

3. On March 6, 2012, the Governing Board of the District (Board) adopted Resolution No. 2191, which proposed to reduce or discontinue the particular kinds of services encompassing 78.8 full-time equivalent (FTE) positions by the close of the 2011-2012 school year.

4. Resolution No. 2191 specifically provides for the reduction or elimination of the following particular kinds of services:

<u>Particular Kinds of Services</u>	<u>Full Time Equivalent (FTE) Positions</u>
Elementary Teacher (Multiple Subject)	27
Middle School English	.6
Middle School Art	1
Middle School Physical Education	1
Middle School Spanish	1
Middle School Social Studies	1
Middle School Science	1
High School Mathematics Coach	1
High School Literacy Coach	1
Resource Teacher (Elementary)	20
Secondary Librarians	7
Adaptive Physical Education	1
Music Teacher	2.2
Special Education (Mild/Moderate)	5
Special Education (Moderate/Severe)	2
Special Education/Infant Toddler Teacher	1
TOSA II, Instructional Services	1
Elementary Principal (Principal on Special Assignment)	1
Coordinator, Center for Independent Studies	1
Coordinator, Student Support Services	1
Coordinator, Grant Administrator (Child Welfare & Attendance)	1
Coordinator, BTSA/PAR/Pathways	1
Total FTE positions to be reduced or eliminated:	78.8

5. By no later than March 15, 2012, the Board and certificated employees of the District, including Respondents, were given preliminary notice that those certificated employees' services would not be required for the following school year, due to the reduction of particular kinds of services.

6. Respondents timely requested a hearing to determine if there is cause for terminating their services. Each Respondent was thereafter served timely with an Accusation. Respondents timely filed Notices of Defense, which resulted in the instant hearing.

7. All prehearing jurisdictional requirements have been met.

8. The services set forth in factual finding 4 are particular kinds of services which may be reduced or discontinued within the meaning of section 44955.¹

9. The District seeks to reduce or discontinue the services set forth in factual finding 4 due to budget issues. The Board's decision to reduce or discontinue the services is not arbitrary or capricious but is rather a proper exercise of the District's discretion.

10. The reduction or discontinuation of services set forth in factual finding number 4, in the context of a budget shortfall and the need to continue providing services to students, is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the Board.

11. The District properly considered all known attrition in determining the actual number of necessary layoff notices to be delivered to its employees.

12. Taking into account the findings and conclusions below, no permanent certificated employee with less seniority will be retained to render a service that the Respondents are certificated and competent to render.

Bumping & Skipping Challenges

International Baccalaureate

14. Pursuant to Resolution No. 2191, the Board determined that it was necessary to retain certificated employees for the following school year regardless of seniority (skipping) to teach a specific course or courses of study who possess the certain types of special training and experience which others more senior do not possess. The following category was disputed:

C. Currently assigned to an International Baccalaureate (IB) position and in the last ten years participated in a minimum of 18 hours of specialized training for the position.

15. Steven Miller (Miller), the District's Director of Human Resources, testified at the hearing. Although the resolution focused only on those teachers who were currently assigned to the IB sites, which are Willard Elementary and Blair International Baccalaureate School (Blair), Miller stated that he also included any other teachers who had been IB trained with 18 hours of authorized training. Miller explained his rationale for deviating from the skipping criteria as set forth in the resolution: the District had paid for the IB training, and thus it had an investment in retaining these teachers, even if they were not currently assigned to an

¹ All further references are to the Education Code.

IB school. Seven teachers were skipped from the layoff based on the IB skip criteria. Of those seven, four teachers who were not currently in an IB assignment were skipped from the layoff. The District determined that the employees retained possessed the special skills and experience necessary to fill the corresponding need.

16. Kathy Onoye (Onoye), Executive Director of the elementary school programs in the District, testified at the hearing. Onoye described the IB program as an internationally recognized program, authorized from Geneva, Switzerland. It is highly recognized and is attractive to parents as well as being an excellent model of education. According to Onoye, the IB program is based on practices of a holistic integrated approach toward education. IB is inquiry based, meaning the teachers guide the students in asking questions, going to primary resources to find answers, and to compose a way of communicating their answers. IB requires students to take the lead in asking questions, critical thinking, problem solving and a global view of education. Onoye explained that it took the District four years to obtain authorization. Since then, the District has been maintaining its authorization. The District invested a million dollars at the outset to develop the program with personnel. To begin teaching in an IB school, no training is necessary; however, the goal is to have the teacher complete the authorized 18-hour training by the year-end. The District did not meet that goal in every instance, meaning that there were teachers in the IB school who had not completed the authorized training. Onoye maintained that the District offered IB training to as many teachers as possible.

17. Nancy Swartz (Swartz), IB coordinator at Blair High School, testified at the hearing. As established by Swartz's testimony, in recent years the District had difficulty offering formal IB training to teachers because of budget restrictions. The District has provided IB training to about 75 percent of its teachers at Blair High School. Notably, the District received a warning from Geneva about its teachers not having the authorized training. The District must be in compliance with the IB training requirements in order to stay accredited. If untrained IB teachers were to bump into the program, it would be more costly to the District because the District would have to train them.

18. During the hearing, the District became aware that it proposed to skip Angela Chavez (Chavez), who did not have the authorized 18-hour training. She had been properly noticed as a respondent in this proceeding, and thus the District announced that it sought to layoff Respondent Chavez, and she would not be skipped.

19. Respondent Chavez testified at the hearing. She acknowledged that she did not attend the authorized 18-hour training, even though she had the opportunity to do so. Respondent Chavez was offered a different position and she left the IB school site and did not attend the training. The evidence showed that that the authorized training is necessary for the District to maintain its authorization. Respondent Chavez acknowledged that she has not completed the authorized training. Thus, Respondent Chavez does not possess the special training and experience necessary to perform the duties of an IB teacher. (See *Bledsoe v. Biggs Unified School District* (2008) 170 Cal.App.4th 127, 142.)

20. Respondent Melinda Bernabe (Bernabe), is a sixth grade math, science and robotics teacher at Blair, with a seniority date of September 6, 2005. She has taught in that capacity for two years. Although she tried to complete the authorized training earlier, Respondent Bernabe only recently completed the required training, after March 15, 2012. She did not know the authorized 18-hour training was required, or that the District was going to use it as a skipping criteria until February 2012. The District is not required to consider information which occurred after its issuance of preliminary notice. At the time the layoff order was determined, Respondent Bernabe did not possess the authorized 18-hour training necessary to teach in the IB program. Thus, the District properly determined the layoff order with respect to Respondent Bernabe.

21 The parties stipulated that if called to testify, Respondents Ruth Several, Erin Musick, Michelle Turnbough, and Kristin Stafford would have testified that they would have gladly undertaken any training to teach the IB program if the District had offered it to them.

22. Although the District has demonstrated its specific needs for personnel to teach specific courses, it failed to show that the employees listed in Exhibit 15 who were skipped meet the enumerated criteria.² Specifically, three of the teachers who were skipped are not currently teaching in an IB school. Although the District is correct that Section 44955, subdivision (d) does not require the skipping criteria to be formally adopted, application of that criteria must not be arbitrary. The District's later deviation from the skipping criteria was applied in an arbitrary manner because the availability of authorized training was limited. Thus, the District failed to meet its burden that IB is a valid skip with regard to teachers who have received the training, but are not currently assigned to an IB site. Accordingly, only those three teachers who are currently assigned to an IB site and have received the required 18-hour training may be skipped.

Coordinated Early Intervention Services

23. Resolution No. 2191 also enumerated the following category as a basis for deviating from termination based on seniority:

D. Currently assigned to a Coordinated Early Intervention Services Teacher position and over the last five years participated in a minimum of 50 hours of specialized training for the position.

² Official notice was taken of the layoff decision for 2011 (OAH No. 2011030848), with respect to William Jenkins and the Pathways program. The Pathways program is not at issue here. The District sought to compare, by way of analogy, the District's treatment of the Pathways program last year, to its treatment of the IB program this year. The 2011 decision does not provide support for the District's contention. The 2011 decision simply stated that the parties stipulated to retain Jenkins because he was subject to the Pathways skip. The Pathways skip was not discussed in detail.

24. Miller explained that in order to be hired into a CEIS position, a candidate must undergo a distinct application and interview procedure, which includes a three-part screening process. As established by his testimony, the District views the Coordinated Early Intervention Services (CEIS) as a separate job classification, which was not included in the proposed reduction of services under Resolution No. 2191. Put differently, the District's position is that CEIS is not a particular kind of service which the Board resolution called to reduce. The District argued in the alternative, that if CEIS is not considered to be a separate job classification, then it should be considered a "skip," meaning that a junior employee could be retained over a more senior employee because they possess special training and experience that others who are more senior do not.

25. Onoye described CEIS as a coordinated early intervention for young learners who have significant gaps in their learning abilities in kindergarten or first grade. As established by Onoye's testimony, the District has trained the CEIS teachers intensively to deal with learning disabilities, to intervene early so that the students are able to progress and receive regular instruction. The CEIS job description is separate from elementary instruction. CEIS teachers work with both the classroom teacher and the parents to assist the student in need. They work in small groups, or one-on-one, and pull students out of their regular classroom instruction. A student may spend one or more hours with a CEIS teacher, depending on the child's needs. CEIS teachers have a different caseload than regular classroom teachers. CEIS teachers are trained in areas such as attention-deficit hyperactivity disorder, learning disabilities, dyslexia, different ways of teaching reading and helping students with literacy, and multi-modality phonemic awareness. The District has invested about \$15,000 to \$20,000 in training CEIS teachers in the past two years. Since the District implemented the program, it has offered 84 hours of CEIS training. CEIS teachers must have at least 50 hours of training to meet the skipping criteria. The District skipped six CEIS teachers. (Exh. 15.)

26. The District did not establish that CEIS teachers should be treated as a separate classification. Although there was some testimony that the District views it as such, the evidence did not sufficiently explain the distinction of a separate classification. Moreover, the Board's resolution specifically enumerated CEIS as part of its skipping criteria, and thus it must be treated accordingly. In any event, the District has demonstrated its specific needs for personnel to teach specific courses. It has also shown that employees who were skipped have received the special training and experience necessary to provide the needed services; and that no employees with higher seniority dates possess the same special training and experience.

27. Respondent Martha Tovar (Tovar) is a first-grade elementary teacher at McKinley elementary school, with a seniority date of October 1, 2006. Respondent Tovar holds a multiple-subject credential. She is currently enrolled at UCLA in a program to obtain her reading certificate. Respondent Tovar maintained that she completed some of the trainings which are similar to the District's CEIS trainings, and spent at least 80 hours in training. Respondent Tovar contends that she is competent to teach as a CEIS instructor, because she believes there are a lot of parallels between the strategies that CEIS employs and what she learns at UCLA. The evidence showed otherwise. Of the 31 trainings that the District offered, 13 were entitled "CEIS." Respondent Tovar did not attend any of the

District's CEIS programs, nor did she attend anything similar at UCLA. Respondent Tovar explained that the biggest difference between her UCLA program and the CEIS program is the special education element, which is a key component of the CEIS program.³ On cross examination, Respondent Tovar admitted that she applied for a CEIS position with the District and was not accepted. She also acknowledged that the instruction she receives at UCLA is not as targeted as the CEIS program at the population of students with significant learning disabilities. Respondent Tovar stated that her reading certificate program is broader and applies to every student. Therefore, Respondent Tovar does not possess the special training and experience necessary to perform the duties of the CEIS teacher. (See *Bledsoe v. Biggs Unified School District* (2008) 170 Cal.App.4th 127, 142.)

28. Respondents Emily Brink (Brink) and Lindsay Lewis (Lewis) contended that they were credentialed and competent to be CEIS teachers. The evidence established that although she had some similar training, Respondent Brink had not attended any of the specific CEIS trainings. She did not complete 50 hours of CEIS training, and had never taught in a CEIS position. No evidence was presented with regard to Respondent Lewis's CEIS training. Thus, it was not established that she had the requisite training. Notably, Respondent Lewis interviewed for, but did not receive, the position of CEIS teacher with the District. Accordingly, Respondents Brink and Lewis do not possess the special training and experience necessary to perform the duties of the CEIS teacher. (See *Bledsoe v. Biggs Unified School District*, *supra*, 170 Cal.App.4th 127, 142.)

Other Challenges

Competency

29. The District has established a competency rule. In pertinent part, Exhibit B to Resolution No. 2191 states: "A certificated employee subject to layoff shall be considered competent to perform a service if and only if: (1) The certificated employee has under the appropriate credential performed the service for the District for one complete school year [w]ithin the last ten (10) years."

30. The parties dispute the validity of the requirement of having taught one year within the past ten. Gregory Evans (Evans) is a physical education teacher with a single-subject physical education credential, with seniority date of October 18, 2010. The District did not give Evans a layoff notice, because he met the competency definition; i.e., he taught physical education for one year within the past ten years. On the other hand, Respondent Lindsay Olson (Olson), is an adaptive physical education teacher, with a seniority date of September 10, 2010, and a single-subject physical education credential with a certificate in adaptive physical education. Although she is qualified to teach physical education, the

³ Although there was some evidence that CEIS students are not classified as special education students, it was established that CEIS focuses on early intervention and learning disabilities, and that is the context in which Respondent Equite used the terms "special education" in her testimony.

District issued Respondent Olson a layoff notice, even though she is senior to Evans, because she has not taught one year of physical education within the last ten years. Specifically, Respondent Olson has not taught the national standards for physical education and a full physical education curriculum within the District. Thus, according to the District, Respondent Olson is not competent to teach physical education.

Tie-breaking Criteria

31. Exhibit A to Resolution No. 2191 established tie-breaking criteria to determine the relative seniority of certificated employees who first rendered paid probationary service on the same date. The tie-breaking criteria was used in this manner to resolve ties in seniority amongst certificated personnel. The validity of the tie-breaking process is not in dispute.

32. Respondent Jacqueline Equite (Equite) disputed whether her years of experience at the District were correctly calculated when applying the tie-breaking criteria. The tie-breaking criteria provides that years of experience is defined as full-time, fully credentialed teaching in a probationary or permanent assignment. Respondent Equite was not fully credentialed during her first year teaching in the District. Thus, the District did not include this year in its calculation of Respondent Equite's experience. The evidence showed that the District correctly calculated her years of experience and properly applied the tie-breaking criteria to Respondent Equite.

Seniority

33. Respondent Celine Nattkemper (Nattkemper) testified at the hearing regarding the accuracy of her seniority date. During her testimony, she withdrew her claim. Accordingly, Respondent Nattkemper's seniority date will remain the same as listed in Exhibit 8.

LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to sections 44949 and 44955, by reason of factual finding numbers 1 through 7.

2. The services listed in factual finding number 4 are determined to be particular kinds of services within the meaning of section 44955, by reason of factual finding numbers 4 and 8.

3. Cause exists under sections 44949 and 44955 for the District to reduce or discontinue the particular kinds of services set forth in factual finding number 3, which cause relates solely to the welfare of the District's schools and pupils, by reason of factual finding numbers 1 through 33.

4. Section 44955, subdivision (b), provides, in pertinent part: “[t]he services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is *certificated and competent* to render.” (Emphasis added.) “Certificated” is defined by the provisions of the Education Code pertaining to credentials, but “competent” is not specifically defined.

Based on decisions in analogous layoff and reemployment contexts, the Court in *Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555, 565 (*Duax*), concluded “that a board’s definition of competency is reasonable when it considers the skills and qualifications of the teacher threatened with layoff.” (See also *Martin v. Kentfield School District* (1983) 35 Cal.3d 294, 299-300; *Forker v. Board of Trustees* (1994) 160 Cal.App.3d 13, 19.) In *Duax*, the governing board had established a standard of competency that required one year of full-time teaching in the subject area within the last ten years. The Court found such standard “clearly related to skills and qualifications to teach” and therefore a reasonable one. (*Duax, supra*, 196 Cal. App.3d 555, at p. 567.) The Court also concluded that the standard did not define competency too narrowly.

The District’s competency rule, as set forth in Resolution No. 2191, set forth in factual finding number 29, relates to the skills and qualifications of its certificated employees, as required by the foregoing authorities, and may be used by the District in implementing the layoffs. Contrary to Respondents’ argument, the District presented evidence that it considered the skills and qualifications of the senior teacher subject to layoff.

Applied here, Respondent Olson does have a credential that allows her to teach physical education as a single subject, but she has not taught this subject at the District in the past ten years. Accordingly, she is not competent to render a service, physical education instruction, that a more junior certified employee was retained to render.

5. Cause does not exist to uphold the skipping criteria for the IB program, with regard to employees who are not currently assigned to an IB school. Thus, four of the employees identified in Exhibit 15, who are not currently assigned to an IB school, may not be skipped. The District must retain the four most senior employees noticed in this layoff proceeding, by reason of factual finding number 22, and legal conclusion number 4.

6. Cause exists to terminate the services of 50 of the Respondents listed in Exhibit 4B (excluding the four most senior employees who were improperly skipped), by reason of factual finding numbers 1 through 33, and legal conclusion numbers 1 through 5.

ORDER

The Accusations are sustained and the District may notify Respondents listed in legal conclusion number six, except for those specifically excluded, that their services will not be needed during the 2012-2013 school year due to the reduction of particular kinds of services.

Dated: May 4, 2012

AMY C. YERKEY
Administrative Law Judge
Office of Administrative Hearings